Nos. 17-1717, 18-18

IN THE

Supreme Court of the United States

THE AMERICAN LEGION, *ET AL.*

Petitioners,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *ET AL.*,

Respondents.

On Writs Of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR *AMICI CURIAE* CITIZENS UNITED AND CITIZENS UNITED FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THE FOURTH CIRCUIT'S RULING WRONGLY PROHIBITS GOVERNMENT ASSISTANCE FOR PRESERVATION OF HISTORIC RELIGIOUS SITES. 3

II. THE *LEMON* TEST SHOULD FINALLY BE LAID TO REST 15

A. The Court Should Restore The Original Meaning Of The Establishment Clause. 15

B. *Stare Decisis* Is No Obstacle To Setting *Lemon* Aside. 21

III. THE ESTABLISHMENT CLAUSE DOES NOT APPLY TO THE STATES. 25

A. The Establishment Clause Should Not Be Incorporated Because It Is A Federalism Provision 26

B. *Stare Decisis* Should Not Prevent Correcting The Incorporation Mistake. 30

CONCLUSION 34

TABLE OF AUTHORITIES

Page

Cases

Agostini v. *Felton*,
521 U.S. 203 (1997) 21

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512 U.S. 687 (1994) 16

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444 U.S. 646 (1980) 22

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592 U.S. 573 (1989) 18, 21, 22

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544 U.S. 709 (2005) 18, 24, 33

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482 U.S. 578 (1987) 17, 18, 22

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542 U.S. 1 (2004) ..... *passim*

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v. *Smith*,
494 U.S. 872 (1990) 33

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330 U.S. 1 (1947) 2, 31

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514 U.S. 549 (1995) 29

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INTERESTS OF *AMICI CURIAE*[*]

Citizens United and Citizens United Foundation are dedicated to restoring government to the people through a commitment to limited government, federalism, and free enterprise. *Amici* firmly believe that religious liberty and recognition of God and the values that lie at the heart of Judeo-Christian tradition are critical attributes of our constitutional structure and our continued national health. *Amici* regularly participate as litigants and *amici* in important cases in which these fundamental principles are at stake.

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[*] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund this brief's preparation or submission. The parties have filed blanket consents to the filing of this brief and their letters of consent are on file with the Clerk.

SUMMARY OF THE ARGUMENT

There they go again. No matter how many Justices make it plain in separate opinions that *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), does not provide a historically correct or even useful standard for adjudicating Establishment Clause claims, the lower courts keep applying it. The decision of the Fourth Circuit panel below, in particular, spells disaster not just for war memorials and other traditional, patently inoffensive uses of the Latin cross all across this country, but also (as described herein) for government maintenance of and financial support for the preservation of historically important religious sites. Decisions like the opinion below are possible, in part, because this Court's Establishment Clause jurisprudence is inscrutable, with each new case seemingly bringing forth a new and ever-more nuanced view as to what constitutes an impermissible establishment of religion.

Enough is enough. The Court should end the uncertainty and unpredictability that plagues Establishment Clause jurisprudence. Specifically, the Court should end the cycle of diminishment and subsequent revitalization of the *Lemon* test and restore the original meaning of the Establishment Clause, which prohibited actual coercion of religious practice, belief, or support—and nothing else. Doing so would bring some measure of clarity to an area of law that has long been in need of clear and firm reorientation. The Court could further decrease the frequency of lower court misapplication of the Establishment Clause by overruling *Everson* v. *Board of Education of Ewing*, 330 U.S. 1 (1947), and holding that the Clause is not incorporated against the States.

ARGUMENT

I. THE FOURTH CIRCUIT'S RULING WRONGLY PROHIBITS GOVERNMENT ASSISTANCE FOR PRESERVATION OF HISTORIC RELIGIOUS SITES.

The Fourth Circuit's application of *Lemon* effectively dictates the removal, destruction, or defacement of any prominent religious symbol or structure that receives more than *de minimis* government financial support, thereby endangering efforts to preserve historic religious sites throughout the country.

Under *Lemon*, (1) the government's "purpose" must be "secular"; (2) the government action's "principal or primary effect must be one that neither advances nor inhibits religion"; and (3) the government action "must not foster an excessive government entanglement with religion." 403 U.S. at 612–13 (quotation marks omitted). The panel majority below emphasized that "a violation of even one prong of *Lemon* results in a violation of the Establishment Clause." Pet. App. 15a–16a; *see also* Pet. App. 28a (each violation of a *Lemon* prong "provides an alternative indicator of the Cross's unconstitutionality"). *But see McCreary Cty., Ky.* v. *Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 859 n.10 (2005) (stating "that Establishment Clause doctrine lacks the comfort of categorical absolutes" and allowing that a "governmental action [may be] legitimate even where its manifest purpose was presumably religious").[1]

The panel majority acknowledged the Commission's secular purpose in maintaining the Peace Cross.

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[1] Every citation of the petition appendix refers to the appendix of American Legion Petitioners.

Pet. App. 16a. But even a purpose that is appropriate (from the Fourth Circuit's perspective) would not save a public display of a religious symbol or structure: "'irrespective of government's actual purpose,'" the display is unconstitutional under the effect prong if it "'in fact conveys a message of endorsement or disapproval of religion.'" Pet. App. 17a (quoting *Mellen* v. *Bunting*, 327 F.3d 355, 374 (4th Cir. 2003)). That test, the panel explained, must be applied from the perspective of a "'reasonable observer,'" who is "'aware of the history and context of the community and forum in which the religious speech takes place.'" Pet. App. 16a–17a (quoting *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 119 (2001)).

Such a reasonable observer, the panel majority determined, would believe that the government was endorsing Christianity. The cross is a Christian symbol, a fact not altered by the cross's use in generic war memorials. Pet. App. 17a–20a. And its large "size and prominence" "overwhelm" the plaque that lists the local soldiers who died in World War I and the other "secular [elements]," such as the inscription of the words "valor," "endurance," "courage," and "devotion" on the base of the Cross. Pet. App. 21a–22a. The plaque is too weathered and pedestrian access to the Cross is too difficult for these elements to neutralize the Cross's Christian symbolism, the panel majority reasoned. Pet. App. 22a–24a. They found that the American Legion's symbol, which is imprinted at the center of the Cross, does not help defray the Cross's religiosity because the symbol also is "badly weathered" and, besides, the American Legion is "affiliat[ed] with Christianity." Pet. App. 23a. That the Cross had only "a scattered history of religious use" (in reality,

three Sunday services in a single month in 1931), "has primarily hosted veteran-focused ceremonies," and was not built using government funds did little for the panel majority, because "the initial donors to the memorial fund signed a pledge professing a belief in God, and the Cross has been the scene of Christian activities." Pet. App. 20a.

According to the panel majority, display of the Cross is also unconstitutional because "there is excessive religious entanglement . . . for two reasons." Pet. App. 27a. Simply "displaying the Cross" such that a "reasonable observer" would believe the Commission endorses Christianity entangles government with religion. Pet. App. 28a. (That is, a violation of the second *Lemon* prong is *per se* a violation of the third prong, too.) Separately, even "de minimis government spending" to support the Cross is an unconstitutional entanglement. *Id.*

As explained by petitioners and other *amici* in the briefs in this case, war memorials in Arlington National Cemetery and across the country would be unconstitutional under the Fourth Circuit's reasoning. *See, e.g.*, Br. of *Amici Curiae* State of W. Va., 27 Other States, and Governor of Kentucky in Support of Petitioners 12–27 (July 27, 2018). As Judge Niemeyer foresaw in his dissent from the denial of rehearing *en banc*, the panel decision "puts at risk hundreds of monuments with similar symbols standing on public grounds across the country, such as those in nearby Arlington National Cemetery." Pet. App. 97a.

In fact, the reasoning of the decision below sweeps far more than war memorials into *Lemon*'s trash bin. The federal government's National Park Service

("NPS"), in particular, has supported numerous historic religious sites across the country and even itself owns and/or operates several buildings of religious significance. These sites would almost certainly fail the Fourth Circuit's reasonable observer standard because they are identifiably religious, and the government's assistance to preserve even private displays would very likely qualify as an unconstitutional entanglement.

Examples are everywhere. To begin, the NPS owns and operates St. Paul's Church National Historic Site in Mount Vernon, New York. One of the oldest Episcopal parishes in New York, the church was used for regular worship services until the late 1970s, after which it was transferred to the NPS, which now runs it as a park. *See Saint Paul's Church: History & Culture*, NPS, Feb. 26, 2015, https://tinyurl.com/ya6kqwys; John H. Sprinkle, Jr., *Crafting Preservation Criteria: The National Register of Historic Places and American Historic Preservation* 138 (2014).

The NPS also owns and operates Tumacácori, a National Historic Park in Arizona, which includes three separate Spanish mission sites. *Tumacácori: Missions*, NPS, Feb. 24, 2015, https://tinyurl.com/y7opfjyx. One, San José de Tumacácori (the park's namesake), is immediately identifiable as a religious building, complete with a cross atop the front façade. *Tumacácori: San José de Tumacácori*, NPS, June 20, 2015, https://tinyurl.com/yc84yldw. Each year on the first Sunday in December, a Mass is performed in front of the church as part of a fiesta celebrating the cultures associated with the local area. *Tumacácori: La Fiesta de Tumacácori*, NPS, Nov. 5,

2018, https://tinyurl.com/y7xqycdw. An estimated $20 million has been spent on preserving the missions since 1917. *Tumacácori: Preservation*, NPS, Mar. 16, 2018, https://tinyurl.com/ybvz8fua.

Similarly, the NPS manages a historical park consisting of Spanish missions in San Antonio. *San Antonio Missions*, NPS, Nov. 13, 2018, https://tinyurl.com/my3pnlg. Four missions in the park have regular church services. *See San Antonio Missions: Church Information*, NPS, Oct. 24, 2018, https://tinyurl.com/y93bkgdj. Although the NPS is not currently responsible for the preservation of the mission buildings, it was the Works Progress Administration that "reconstructed" the Mission San José in the 1930s. *San Antonio Missions: Mission San José*, NPS, June 18, 2018, https://tinyurl.com/ybbv7tld. The NPS reports that $3.2 million in federal funds are appropriated for the park's operating budget. *San Antonio Missions: Park Statistics*, NPS, Feb. 24, 2015, https://tinyurl.com/ycgcx757.

Separate from the park system itself is the Save America's Treasures grant program, under which the NPS, along with other agencies such as the National Endowment for the Arts, provides funds "for projects to preserve nationally significant collections and historic property." 54 U.S.C. § 308902. A property is eligible for a grant if is "listed on the national Register of Historic Places at the national level of significance" or is "designated as a National Historic Landmark." *Id.* § 308903(c)(3). The NPS encourages "[h]istoric properties and collections associated with active religious organizations" to apply for grants. *Save America's Treasures Grants*, NPS, https://tinyurl.com/ycya8jnz.

Through this program, the NPS has given millions of dollars for projects at religious sites across the country, many of which are still used today for regular religious services.[2] The grants have supported projects at a number of historic churches from the colonial period. For example:

- The Old North Foundation received $317,000 for the Old North Church in Boston, Massachusetts. This historic Episcopal church is where, at the order of Paul Revere, lanterns were lit to signal the British army's movement during the nascent days of the Revolutionary War. *See About Old North*, The Old North Church & Historic Site, https://tinyurl.com/y9dxbemm. The church is immortalized in Henry Wadsworth Longfellow's poem, *Paul Revere's Ride*: "He said to his friend, 'If the British march / By land or sea from the town to-night, / Hang a lantern aloft in the belfry-arch / Of the North-Church-tower, as a signal-light, – / One if by land, and two if by sea; / And I on the opposite shore will be.'" *Longfellow's Poem, "Paul*

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[2] Save America's Treasures grants awarded between 1999 and 2010 are catalogued in an interactive online map compiled by the American Architectural Foundation, and all amounts and receiving entities of Save America's Treasures grants herein are taken from this map. *See Treasure Map: Mapping the Impact of Save America's Treasures*, Am. Architectural Found., https://tinyurl.com/ya64dusw. The program has recently been revitalized. *See, e.g.*, *Save America's Treasures – Preservation*, Grants.gov, Oct. 15, 2018, https://tinyurl.com/ybgosh56; *Save America's Treasures Grants*, NPS, https://tinyurl.com/ycya8jnz.

Revere's Ride," The Old North Church & Historic Site, https://tinyurl.com/y7z5t4j9.

- Christ Church in Philadelphia, Pennsylvania, which was founded in 1695, received $350,000. The building dates to 1744 and hosts regular Episcopal services. *The History and People of Christ Church*, Christ Church, https://tinyurl.com/ybg479pj.

- The United First Parish Church in Quincy, Massachusetts, which is home to an active Unitarian Universalist congregation, received $100,000. The church is known as the "Church of the Presidents" because it is the burial place of Presidents John Adams and John Quincy Adams and their wives, First Ladies Abigail Adams and Louisa Catherine Adams. The congregation dates back to 1636, and the current building was completed in 1828. *History & Visitor Program*, United First Parish Church (Unitarian), https://tinyurl.com/y75upr5o.

- The First Parish in Hingham received $300,000 for the Old Ship Meeting House in Hingham, Massachusetts, which dates back to 1681 and "is the oldest church in continuous use as a house of worship in North America." Lawrence Lindner, *Classic New England: Five for the Road*, Wash. Post, (Apr. 22, 2007), https://tinyurl.com/y75j4fho; *see also About the Friends & the Friendship Fund*, Friends of the Old Ship Meeting House, 2011,

https://tinyurl.com/ydyxfuez. The congregation is Unitarian Universalist. First Parish, Hingham – Old Ship Church – Unitarian Universalist, https://tinyurl.com/yaj2pbtr.

- Historic St. Luke's Church Restoration Inc. received $250,000 for St. Luke's Church in Smithfield, Virginia, which was completed in the 1680s and is the oldest church building in Virginia. *Our History*, Historic St. Luke's Church, https://tinyurl.com/y8bh33hx.

Other churches unassociated with colonial English history have received large grants from the Save America's Treasures program. For example:

- The Washington National Cathedral received $700,000, which it planned to put toward costs associated with repairing the damage from the earthquake that rattled D.C. in the summer of 2011. *See* Richard Simon, *Proposed Aid for Washington National Cathedral Draws Criticism*, L.A. Times, (Oct. 25, 2011), https://tinyurl.com/ybtavuko. Construction on the Cathedral began in 1907 and was completed in 1990. *Timeline*, Wash. Nat'l Cathedral, https://tinyurl.com/lxwo8l5. Even before construction on the Cathedral began, President William McKinley attended the dedication of a large Peace Cross on the Cathedral grounds. *See Proclaiming Peace*, Wash. Nat'l Cathedral, Mar. 23, 2016, https://tinyurl.com/yc2ufdh2. In addition to holding

regular Episcopal services, the Cathedral often hosts services related to political events or the deaths of important political figures. Just this year, funeral services for President George H. W. Bush and Senator John S. McCain III were held at the Cathedral.

- The Roman Catholic Diocese of Reno received $500,000 for St. Mary's in the Mountains Catholic Church in Virginia City, Nevada, which was built in 1877. Julie Rose, *St. Mary in the Mountains Catholic Church*, Online Nev. Encyclopedia, Mar. 20, 2009, https://tinyurl.com/ycbfz4he.

- The Channing Memorial Church in Newport, Rhode Island, which is home to a Unitarian Universalist congregation, received $440,000. The congregation dates back to the mid-1830s. *See Channing History*, Channing Mem'l Church, 2017, https://tinyurl.com/yd99v6pu.

- Historic Missions Restoration, Inc. received $197,221 for the Socorro Mission in Socorro, Texas, a Franciscan church which was built in the mid-nineteenth century and continues to host regular Catholic services. *See Spanish Missions: Socorro Mission*, NPS, Apr. 15, 2016, https://tinyurl.com/ybkcv2zt; *La Purisma-Socorro Mission*, Catholic Diocese of El Paso, https://tinyurl.com/ybbxfnm9.

Multiple Jewish synagogues have received grants, as well. For example:

- The Touro Synagogue Foundation, which preserves the oldest synagogue in the United States, received $375,000. The "Hebrew Congregation" in Newport, Rhode Island, that was the recipient of President Washington's 1790 letter on religious toleration called the Touro Synagogue home. *See George Washington and His Letter to the Jews of Newport*, Touro Synagogue, https://tinyurl.com/jr76hep. A congregation still worships at the synagogue. *See Prayer Services*, Touro Synagogue, 2018, https://tinyurl.com/y86ahkp5.

- The Eldridge Street Project received $300,000. The Project restored the Eldridge Street Synagogue, "the first great house of worship built in America by Jewish immigrants from Eastern Europe." *The Museum at Eldridge Street*, Museum at Eldridge Street, https://tinyurl.com/yaxqjcdb. The synagogue is now a museum, but it also continues to host Shabbat and holiday services. *Lower East Side Jewish History*, Museum at Eldridge Street, https://tinyurl.com/y7xvr35z.

Important churches in African American history have received grants from both the Save America's Treasures program and the separate African American Civil Rights grants program. *See Civil Rights Grant Program: Application Information*, NPS, https://tinyurl.com/y6urhh3v. For example:

- The Sixteenth Street Baptist Church in Birmingham, Alabama, which was built in 1911,

has received both Save America's Treasures and African American Civil Rights grants. It was under the front steps of this church that the Ku Klux Klan detonated a bomb on the morning of September 15, 1963, killing four young girls. The event "was a pivotal moment that helped prod the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965." Jessica Ravitz, *Siblings of the Bombing: Remembering Birmingham Church Blast 50 Years On*, CNN (Sept. 17, 2013), https://tinyurl.com/oylam55. The congregation is still active today. *See* 16th Street Baptist Church, Where Jesus Christ Is the Main Attraction!, https://tinyurl.com/y7xtcocd/. The Church received $400,000 from the Save America's Treasures program and $500,000 from the African American Civil Rights program. *See Civil Rights Grant Program: African American Civil Rights Grants*, NPS, https://tinyurl.com/ycagavjp.

- The Mother Bethel Foundation received a $450,000 Save America's Treasures grant for the Mother Bethel A.M.E. Church in Philadelphia, which is situated on the oldest piece of property continuously owned by African Americans. *See Mother Bethel African Methodist Episcopal (AME) Church*, Visit Phila., https://tinyurl.com/y7u6lcql. The church holds regular worship services. *Worship / Bible Study*, Mother Bethel African Methodist Episcopal Church, https://tinyurl.com/y7atjyur.

- St. Mark's A.M.E. Church of Topeka, Kansas Inc. received $231,804 from the African American Civil Rights program. *Civil Rights Grant Program: African American Civil Rights Grants*, NPS, https://tinyurl.com/ycagavjp. The church building is more than 100 years old and hosts regular services. Phil Anderson, *North Topeka Church Receives $231,000 Grant from National Park Service*, Topeka Cap.-J. (Feb. 19, 2017), https://tinyurl.com/y9gup5mg; St. Mark's AME Church, https://tinyurl.com/ydz4d2x9.

NPS maintenance of and grants to assist the preservation of historic religious sites are very likely unconstitutional under the *Lemon* test as it was understood and deployed by the Fourth Circuit panel majority. It is essentially irrelevant that the NPS has a purpose other than promoting religion (the preservation of important historic sites). The Fourth Circuit recognized that there was a secular purpose underlying the government's maintenance of the Peace Cross. *See* Pet. App. 16a ("The Commission obtained the Cross for a secular reason—maintenance of safety near a busy highway intersection. The Commission also preserves the memorial to honor World War I soldiers. Government preservation of a significant war memorial is a legitimate secular purpose."). But the panel majority held display of the Cross was unconstitutional anyway, because even "de minimis government spending" to maintain it violates the Constitution. Pet. App. 28a. Under the panel majority's reasoning, government assistance in the preservation of historic religious sites, regardless of

denomination or beliefs—from the Tumacácori mission in Arizona to the Touro Synagogue in Newport, Rhode Island, and the Old North Church in Boston to the Sixteenth Street Baptist Church in Birmingham, Alabama—is unconstitutional. That result is absurd, and should not be accepted.

II. THE *LEMON* TEST SHOULD FINALLY BE LAID TO REST.

The Court should take this opportunity to once and for all disavow the *Lemon* test.

A. The Court Should Restore The Original Meaning Of The Establishment Clause.

Lemon's three-part test is untethered to the Establishment Clause's original meaning, which forbade Congress from establishing a national religion or interfering with state or local establishments of religion. *Town of Greece, N.Y.* v. *Galloway*, 572 U.S. 565, 604–05 (2014) (Thomas, J., concurring in part and concurring in the judgment) (summarizing historical evidence); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment) (same); *see also* Donald L. Drakeman, *Church, State, and Original Intent* 260 (2010) (concluding that the Establishment Clause prohibits Congress "from establishing a 'national religion'"). Such establishments "necessarily involve actual legal coercion." *Newdow*, 542 U.S. at 52 (Thomas, J., concurring in the judgment); *see* also Br. for Am. Legion Petr's 25–40.[3]

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[3] A government also might establish "a religion by imbuing it with governmental authority or by 'delegat[ing] its civic authority to a group chosen according to a religious criterion.'" *Newdow*,

Mere "[o]ffense, however, does not equate to coercion." *Town of Greece*, 572 U.S. at 589. Rather, "[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting); *see* Leonard W. Levy, *The Establishment Clause: Religion & the First Amendment* 4–5 (1986) (summarizing historical facets of establishments of religion). That is, governments used their "power in order to exact financial support of the church, compel religious observance, or control religious doctrine." *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring in part and concurring in the judgment).

The *Lemon* test sweeps much more broadly. Under *Lemon*, (1) the government's "purpose" must be "secular"; (2) the government action's "principal or primary effect must be one that neither advances nor inhibits religion"; and (3) the government action "must not foster an excessive entanglement with religion." 403 U.S. at 612–13 (quotation marks omitted). None of these prongs bears any relation to the Establishment Clause, as properly understood.

The purpose prong, which invalidates government actions taken with the "predominant purpose of advancing religion," *McCreary*, 545 U.S. at 860, 863, falters on at least two grounds. First, it is a "questiona-

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542 U.S. at 52 (Thomas, J., concurring in the judgment) (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 698 (1994)). Public displays of religious symbols and government support for such displays do not implicate those other potential routes to an Establishment Clause violation.

ble premise that [government action] can be invalidated under the Establishment Clause on the basis of its motivation alone, without regard to its effects." *Edwards* v. *Aguillard*, 482 U.S. 578, 610 (1987) (Scalia, J., dissenting). Purpose *might* be relevant to *showing* coercion—and undoubtedly it is relevant to certain free exercise claims. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 545–46 (1993); *Town of Greece*, 572 U.S. at 597 (Alito, J., concurring) (explaining that "intentional" decision not to invite representatives of minority religions to give legislative invocation would be "very different[ ]"). But purpose cannot itself be the test for an Establishment Clause violation. A governmental action may be intended to advance religion, but that has no bearing on whether it *in fact* coerces support for religion. Is a food bank for the homeless unconstitutional if the government official who authorized it announced that he favored spending public funds on that project on account of his religious belief in the importance of feeding the hungry?[4]

Second, *Lemon*'s demand that government not seek to "advance religion" is incompatible with historical and current practice. If *Lemon*'s "advancement" prong were applied in a principled manner, governments would be forbidden from providing exemptions from generally applicable laws and regulations. Yet, not only are accommodations "permissible" and "desirable," in some circumstances they may be "required

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[4] Even worse, this Court has previously suggested that courts can infer a predominant religious purpose by asking how an "objective observer" would view the "text, legislative history, and implementation of the statute, or comparable official act." *McCreary*, 545 U.S. at 862–63 (quotation marks omitted).

by the Free Exercise Clause." *Aguillard*, 482 U.S. at 617–18 (Scalia, J., dissenting); *see also Cutter* v. *Wilkinson*, 544 U.S. 709, 726 n.1 (2005) (Thomas, J., concurring); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 38–39 (1989) (Scalia, J., dissenting). Government seeks to advance religion in innumerable other ways, from exempting religious institutions "from the obligation to pay property taxes" to "allow[ing] students to absent themselves from public school to take religious classes." *McCreary*, 545 U.S. at 891 (Scalia, J., dissenting). And this Court has twice "approved (post-*Lemon*) government-led prayer to God." *Id.* at 892; *see Town of Greece*, 572 U.S. at 591–92. It does not offend the Establishment Clause to prefer "religion over irreligion." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 855–56 (1995) (Thomas, J., concurring). But forbidding government actions that have the effect of advancing religion would result in the prohibition of even non-coercive "religion-neutral" policies that are required to avoid violating *other* constitutional rights. *Id.* at 842–43.

There also are severe practical problems in identifying whether a government action in fact advances religion. It is exceedingly difficult to determine if government action "endorses or disapproves of religion" by "send[ing] a message to nonadherents that they are outsiders, not full members of the political community" or "the opposite message." *Cty. of Allegheny* v. *ACLU Greater Pittsburgh Chapter*, 592 U.S. 573, 625 (1989) (O'Connor, J., concurring) (quotation marks omitted). This standard is generally applied, as the Fourth Circuit panel did below, from the viewpoint of a so-called reasonable observer. But even proponents of *Lemon* disagree about what the reasonable observer

standard-within-a-standard entails. Justice O'Connor argued that "proper application of the endorsement test requires that the reasonable observer be deemed more informed than the casual passerby." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part and concurring in the judgment). Her reasonable observer is "a personification of a community ideal of reasonable behavior," who is "aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780 (quotation marks omitted). Justice Stevens, on the other hand, disagreed with this "well-schooled jurist" standard, preferring "the universe of reasonable persons," i.e. "whether some viewers of the religious display would be likely to perceive a government endorsement." *Id.* at 800 n.5 (Stevens, J., dissenting).

Neither version of the "reasonable observer," however, yields a "principled way to choose between" one person's "honest and deeply felt offense" at seeing a religious symbol and another person's similar feeling upon the "removal of the sign or display." *Van Orden v. Perry*, 545 U.S. 677, 696–97 (2005) (Thomas, J., concurring).

Consider a recently reported incident: President Trump's lack of participation in the group reading of the Apostles' Creed during President George H. W. Bush's funeral at the Washington National Cathedral. *See* Hasan Dudar, *Trumps Take Heat for Not Reciting Apostles' Creed at George H.W. Bush Funeral*, USA Today (Dec. 6, 2018), https://tinyurl.com/ybjlxuy9. If the President had spoken the Creed while live on national television, would a reasonable observer have believed that he sent a message to "nonadherents that

they are outsiders"? Did the President's failure to join the four living former Presidents in the reading signal "the opposite message"? Restoring the original meaning of the Establishment Clause—a prohibition of actual coercion—eliminates the need to attempt the impossible task of divining the "effect" of a government action on the community as a whole. *See also* Br. for Am. Legion Pet'rs 47–51.

Finally, to the extent entanglement presents a separate consideration than the purpose or effect prongs, it too extends farther than the original meaning of the Establishment Clause. It may be that provision of "exclusive or disproportionate funding to pervasively sectarian institutions" violates the Constitution, *Bowen* v. *Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, J., concurring), because appropriating tax dollars in that manner would in effect "exact financial support of the church," *Town of Greece*, 572 U.S. at 608 (Thomas, J., concurring in part and concurring in the judgment).[5] But the *Lemon* test has been applied to prohibit "*any* use of public funds," *Bowen*, 487 U.S. at 623 (O'Connor, J., concurring), where (for example) the money may be spent on "religious educational functions," *Lemon*, 403 U.S. at 613, or to maintain a

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[5] The Court has implied that this principle might apply where allocation of funds would disproportionately flow to religious institutions over non-religious institutions. *See Zelman* v. *Simmons-Harris*, 536 U.S. 639, 653 (2002) (finding that school choice program created "no financial incentives that skew the program toward religious schools" (quotation marks and alterations omitted)). *But see Rosenberger*, 515 U.S. at 855–56 (Thomas, J., concurring) (explaining "that Madison saw the principle of nonestablishment as barring governmental preferences for *particular* religious faiths," not religion generally).

religious display, Pet. App. at 28a (even "de minimis government spending" or mere ownership of the religious display creates an unconstitutional entanglement). Since "government usually acts by spending money," this doctrine faithfully applied would dictate the result that nearly every government action that benefits religion is an impermissible entanglement. *Rosenberger*, 515 U.S. at 843. That cannot be the law.

In summary, "[i]t is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments." *Newdow*, 542 U.S. at 53 (Thomas, J., concurring in the judgment). The *Lemon* test sweeps far beyond such coercive practices and ultimately "requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not." *Cty. of Allegheny*, 492 U.S. at 677–78 (Kennedy, J., concurring in the judgment in part and dissenting in part).

B. *Stare Decisis* Is No Obstacle To Setting *Lemon* Aside.

Although "*[s]tare decisis* is the preferred course," it "is not an inexorable command." *Janus* v. *Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (quotation marks omitted). Indeed, the "doctrine 'is at its weakest when [the Court] interpret[s] the Constitution because [the Court's] interpretation can be altered only by constitutional amendment or by overruling [the Court's] prior decisions.'" *Id.* (quoting *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997)); *see also* Bryan A. Garner et al., *The Law of Judicial Precedent* § 40, at 352 (2016).

"An important factor in determining whether a precedent should be overruled is the quality of its reasoning." *Janus*, 138 S. Ct. at 2479. The *Lemon* test was "poorly reasoned," as demonstrated above. *Id.* Each of the three prongs is far removed from the original meaning of the Establishment Clause, as is the test as a whole. It has resulted in many unfortunate decisions, of which the Fourth Circuit's opinion below is just one. And it will put many more publicly supported religious displays in jeopardy, including government aid to efforts to preserve historic religious sites. *See supra* Part I. Setting aside *Lemon* will "but restore constitutional principles." *Gideon* v. *Wainright*, 372 U.S. 335, 344 (1963).

The *Lemon* test, moreover, has proven wholly unworkable. *Cf. Janus*, 138 S. Ct. at 2481 (explaining that "[a]nother relevant consideration in the *stare decisis* calculus is the workability of the precedent in question"). Its failure in this regard has been repeatedly noted over the course of decades. *Lemon* "is flawed in its fundamentals and unworkable in practice." *Cty. of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in the judgment in part and dissenting in part). "As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve." *McCreary*, 545 U.S. at 900 (Scalia, J., dissenting). The Court has at times has suggested that *Lemon* "sacrifices clarity and predictability for flexibility." *Comm. for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 662 (1980). But in truth, "flexibility" is "'a euphemism . . . for . . . the absence of any principled rationale.'" *Aguillard*, 482 U.S. at 640 (Scalia, J., dissenting) (quoting Jesse H.

Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 681 (1980)).

The lack of a principled rationale is most evident in cases, like this one, involving a display of a religious symbol. For example, the "reasonable observer" standard is difficult, if not impossible, to apply consistently. "Would the majority's version of a reasonable observer be satisfied and better equipped to evaluate the Memorial's history and context if the cross were smaller? Perhaps if it were the same size as the other monuments in the park?" asked Chief Judge Gregory in his dissent below. "Though Establishment Clause cases require a fact-intensive analysis, we must bear in mind our responsibility to provide the government and public with notice of actions that violate the Constitution." Pet. App. 43a; *see also* Br. for Am. Legion Pet'rs 47–51. *Lemon* is plainly not "clear and easy to apply." *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018).

The intermittent and inconsistent invocation of *Lemon* only accentuate these problems. In *Lamb's Chapel v. Center Moriches Union Free School District*, Justice Scalia "bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes [*Lemon*'s] intermittent use has produced." 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment) (citing scholarly criticism). Yet twenty-five years later it still is entirely unclear in what situations *Lemon* should apply. That is especially true (again) in cases concerning displays of religious symbols. Take, for example, *Van Orden* and *McCreary*, the companion Ten Commandments cases. In *Van Orden*, the plurality held that *Lemon* was inappropriate

for passive displays, 545 U.S. at 686, and Justice Breyer in his concurrence declined to apply *Lemon* or, indeed, "any particular test," *id.* at 703–04. On the very same day, Justice Souter's majority opinion in *McCreary* reaffirmed *Lemon*'s "three familiar considerations," particularly the secular purpose prong. 545 U.S. at 859. Majority opinions of this Court sometimes sidestep *Lemon* or omit a citation of it entirely. *See, e.g.*, *Cutter*, 544 U.S. at 717 n.6 (citing *Lemon*, but tersely stating that "[w]e resolve this case on other grounds"); *Town of Greece*, 572 U.S. 565 (not citing *Lemon* at all).

Although "[i]n some cases, reliance provides a strong reason for adhering to established law," here it does not. *Janus*, 138 S. Ct. at 2484. The lack of a "clear or easily applicable standard" means any attempted invocation of reliance interests is, at the very least, "misplaced." *Wayfair*, 138 S. Ct. at 2098; *see also Janus*, 138 S. Ct. at 2484. *Lemon*'s decades of life have not made it any more palatable. That is particularly true here, where "our history and tradition have shown that [the practice in question] could coexist with the principles of disestablishment and religious freedom." *Town of Greece*, 572 U.S. at 578 (quotation marks omitted).

Reliance is lacking, moreover, because *Lemon*'s status has been "uncertain" almost since the day it was written. *Janus*, 138 S. Ct. at 2485. As Justice Scalia famously wrote twenty-five years ago, the *Lemon* test is "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." *Lamb's Chapel*, 508 U.S. at 398. Individual "Justices have, in their own opinions, personally driven pencils

through the creature's heart." *Id.* Indeed, the Court has "gone so far as to say that [*Lemon*] has *never* been binding." *Santa Fe. Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (citing *Lynch* v. *Donnelly*, 465 U.S. 668, 679 (1984)) (emphasis added). Yet still it lives, for now.

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"A certain momentum develops in constitutional theory," Chief Justice Burger observed in *Lemon*, "and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop." 403 U.S. at 624. Time and again, *Lemon* has been pushed back up the hill, only for gravity to pull it into the U.S. Reports yet again. It is past time—finally—for the Court to end this Sisyphean drama and bury *Lemon* for good.

III. The Establishment Clause Does Not Apply To The States.

The Court could further prevent lower courts from causing mischief in future cases involving state and local governments by correcting an underlying mistake: incorporation of the Establishment Clause against the States. "If the Establishment Clause is not incorporated, then it has no application here, where only [state] action is at issue." *Town of Greece*, 572 U.S. at 604 (Thomas, J., concurring in part and concurring in the judgment); *Van Orden*, 545 U.S. at 693 (Thomas, J., concurring).

A. The Establishment Clause Should Not Be Incorporated Because It Is A Federalism Provision.

Only those provisions of the Bill of Rights that protect individuals (as distinct from States) from federal overreach may properly be incorporated against the States. That is true regardless of whether incorporation is accomplished through the Fourteenth Amendment's Due Process Clause or Privileges or Immunities Clause. The Due Process Clause requires the States to abide by "'the same standards that protect those *personal* rights against federal encroachment.'" *McDonald* v. *City of Chicago, Ill.*, 561 U.S. 742, 765 (2010) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10 (1964)) (emphasis added). And if the Court were to revisit the Privileges or Immunities Clause notwithstanding the *Slaughterhouse Cases*, it would find that "the privileges and immunities of [United States] citizens included *individual* rights enumerated in the Constitution". *Id.* at 823 (Thomas, J., concurring in part and concurring in the judgment) (emphasis added).[6]

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[6] Incorporation of the exclusionary rule, which itself "is not an individual right," *Herring* v. *United States*, 555 U.S. 135, 141 (2009), does not undermine the principle that only protections of individuals, not States, are incorporated. The exclusionary rule is a "judicially created" prophylactic meant to deter violations of Fourth Amendment rights. *Id.* at 139–44. As such, it is a doctrine that, so long as it is valid, necessarily accompanies incorporation of the Fourth Amendment because there is no justification for applying "only a watered-down, subjective version of the individual guarantees of the Bill of Rights" to the States. *McDonald*, 561 U.S. at 786 (quoting *Malloy*, 378 U.S. at 10–11).

"The Establishment Clause does not purport to protect individual rights." *Newdow*, 542 U.S. at 50 (Thomas, J., concurring in the judgment). Rather, the Clause prevents the establishment of a national religion and interference with state or local establishments of religion. *See supra* Part II.A. It is best understood, therefore, as a "federalism provision." *Town of Greece*, 572 U.S. at 605 (2014) (Thomas, J., concurring in part and concurring in the judgment).

It makes no sense to incorporate a federalism provision because incorporation would have a "paradoxical effect[:] to apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself." Akhil Reed Amar, *The Bill of Rights* 33–34 (1998); *see also Town of Greece*, 572 U.S. at 606–07 (Thomas, J., concurring in part and concurring in the judgment); *Sch. Dist. of Abingdon Twp.* v. *Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting) ("it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy"). The Establishment Clause cannot be incorporated any more than the Tenth Amendment can be incorporated. Incorporation in either case would "invert[ ] the original import of the Amendment." *Town of Greece*, 572 U.S. at 606 (Thomas, J., concurring in part and concurring in the judgment); *see also, e.g.*, Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. Univ. L. Rev. 1113, 1141 (1988) ("To 'incorporate' this policy of states' rights for application *against* the states would be utter nonsense, for there would be no norms to incorporate. It would be the incorporation

of an empty set of values, akin to an incorporation of the tenth amendment for application against the states.").

At least one scholar has argued that the Establishment Clause was not just a federalism provision, but "also affirmatively immunized the people from the effects of any federal establishment of religion," thereby providing a "substantive personal liberty susceptible of incorporation against the states." Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 Ind. L.J. 669, 677 (2013). *But see* Drakeman, *supra*, at 261 (disputing that the Establishment Clause reflects any "shared values" reflective of individual rights). According to Professor Gedicks, the "disability" imposed by the Constitution on the federal government created twin substantive rights—a "state immunity" and a "personal immunity"—the latter of which was incorporated to the detriment of the former. Gedicks, *supra*, at 692–709.

But Professor Gedicks's argument proves too much. A constitutional prohibition on federal action does not in and of itself create a *personal*, as contrasted with a *state*, right. For example, Article IV, Section 3 prohibits the creation of new States from a portion (or all) of an existing State "without the Consent of the Legislatures of the States concerned." That federal disability obviously is paired with a state immunity, but there is no piggybacking personal right. So, too, with the Establishment Clause. The prohibition on establishment of a national religion does not signify a personal right to be free from a national establishment; rather, "the States are the particular beneficiaries of the Clause." *Town of Greece*, 572 U.S.

at 606 (Thomas, J., concurring in part and concurring in the judgment). Otherwise, *every* federalism provision—including the basic limits on the powers of the federal government—would necessarily pair with a corresponding individual right that would be incorporated against the States through the Fourteenth Amendment. *See* Gedicks, 88 Ind. L.J. at 695–96 (because "federalism protects personal liberty," "the disabilities that federalism imposes on federal action immunize individuals as well as the states"); *cf. United States* v. *Lopez*, 514 U.S. 549, 552 (1995) (the Constitution's "mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties" (quotation marks omitted)).

There would be no basis to exempt the Tenth Amendment from incorporation, for it follows the same template. Indeed, the Tenth Amendment theoretically could be read to provide the same kind of twin immunities that Professor Gedicks has discovered in the Establishment Clause: the federal government is prohibited from exercising powers not delegated to it, and the right to be free from any such exercise is held by "the States respectively" and "the people." But it would be absurd to incorporate the Tenth Amendment, and it is similarly illogical to incorporate the Establishment Clause. *See* Steven D. Smith, *Foreordained Failure* 24 (1995) ("it seems nonsensical or incoherent to suggest that a provision representing 'essential federalism' has substantive meaning independent of its federalism or that the provision has substantive content that can be 'extended' to the states").

Nor is there conclusive historical evidence that the framers of the Fourteenth Amendment believed

the Establishment Clause protected an individual right and incorporated it on that basis. *See generally* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 Ariz. St. L. J. 1085 (1995) (arguing that the Establishment Clause was transformed into a personal liberty that could be incorporated). The evidence supporting that hypothesis is mixed, at best. *See Town of Greece*, 572 U.S. at 607 (Thomas, J., concurring in part and concurring in the judgment); Amar, *supra*, at 252–53 (questioning whether, "even if by 1866 the establishment clause was no longer a state right, pure and simple, [we can] really say that it was a private right of individuals, as opposed to a right of the public at large"). In the context of "the textual and logical difficulties posed by incorporation" of the Clause, "the burden of persuasion . . . rests with those who claim that the Clause assumed a different meaning upon adoption of the Fourteenth Amendment." *Town of Greece*, 572 U.S. at 607 (Thomas, J., concurring in part and concurring in the judgment); *see also Newdow*, 542 U.S. at 51 (Thomas, J., concurring in the judgment). That burden cannot be carried.

B. *Stare Decisis* Should Not Prevent Correcting The Incorporation Mistake.

The Court should not apply *stare decisis* to retain incorporation of the Establishment Clause. The doctrine of *stare decisis* has the least force where constitutional decisions are under reconsideration. *See supra* Part II.B. The case that announced the incorporation of the Establishment Clause, *Everson*, did so obliquely and with minimal reasoning. The opinion

noted that the Free Exercise Clause had been incorporated and then asserted that "[t]here is every reason to give the same application . . . to the 'establishment of religion' clause," noting that the two clauses are "complementary." 330 U.S. at 15. That fleeting, conclusory analysis is owed no deference. *See Janus*, 138 S. Ct. at 2479 (stating that "quality of reasoning" is "[a]n important factor in determining whether a precedent should be overruled"). *Everson* "failed to appreciate that a very different" issue is presented when incorporation of the Establishment Clause is concerned. *Janus*, 138 S. Ct. at 2479. More than that, *Everson* failed to independently assess whether the Establishment Clause should be incorporated. *See McDonald*, 561 U.S. at 763–65 (explaining that despite "shed[ding] any reluctance to" incorporate the individual protections of the Bill of Rights, the Court has engaged in a careful "process of 'selective incorporation'"). The opinion thus "glibly effected a sea change in constitutional law." *Town of Greece*, 572 U.S. at 607 n.1 (Thomas, J., concurring in part and concurring in the judgment). It was not enough to uncritically rely on the prior incorporation of the Free Exercise Clause. *See Janus*, 138 S. Ct. at 2480 (overruling case in part because it was "not well reasoned").

Reliance interests cannot save incorporation of the Establishment Clause. The Free Exercise Clause has been properly incorporated against the States by the Fourteenth Amendment. *See Schempp*, 536 U.S. at 311 (Stewart, J., dissenting) ("That the central value embodied in the First Amendment—and, more particularly, in the guarantee of 'liberty' contained in the Fourteenth—is the safeguarding of an individual's

right to free exercise of his religion has been consistently recognized."). Even most antagonists of Establishment Clause incorporation accept that assessment. *See, e.g.*, *Zelman*, 536 U.S. at 679 & n.4 (Thomas, J., concurring). The Free Exercise Clause, therefore, joins with other protections of individual rights as a bulwark against state encroachment on matters of religious observance and religious conscience. Indeed, "[t]he Free Exercise Clause bars even 'subtle departures from neutrality' on matters of religion." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (quoting *Church of Lukumi*, 508 U.S. at 534).

The Constitution thus prevents States both from targeting particular religions for disfavored treatment and from meaningfully advantaging one denomination such that adherents' ability to practice other religions is diminished. A State very likely could not "decree[ ] that individuals profess a state creed or attend a state service or pay money directly to a state church" without violating the Free Exercise Clause and, perhaps, other individual guarantees, such as the Equal Protection Clause. Amar, *supra*, at 252; *see also Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) ("Thus the [First] Amendment embraces two concepts—the freedom to believe and freedom to act."); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1512 (1990) (concluding that granting "free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation"). As Justice Jackson wrote for the Court in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943), "[i]f

there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The personal right to worship as one sees fit "is susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.* at 639. *But see Emp't Div., Dep't of Human Res. of Ore.* v. *Smith*, 494 U.S. 872 (1990) (rejecting "compelling interest" test where law is neutral and generally applicable).

It is even possible that the individual guarantees of the Free Exercise Clause and the Equal Protection Clause might prevent a State from simply proclaiming an official religion, much as States have official state birds, flowers, fish, and even beverages. *See, e.g.*, Va. Code § 1-510 (establishing, among other things, milk as the official beverage and "George Washington's rye whiskey" as the official spirit of the Commonwealth of Virginia). Such a "noncoercive establishment" might "violate[ ] principles of religious liberty and religious equality," in addition to "offend[ing] basic principles of equal citizenship and equal protection." Amar, *supra*, at 254. In fact, "[i]t may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause, further calling into doubt the utility of incorporating the Establishment Clause." *Newdow*, 542 U.S. at 53 n.4 (Thomas, J., concurring in the judgment); *see also id.* at 54 n.5; *Van Orden*, 545 U.S. at 693 (2005) (Thomas, J., concurring); *Cutter*, 544 U.S. at 728 n.3 (Thomas, J., concurring).

The Court need not and should not decide the full breadth and depth of the Free Exercise Clause in this case. If it is inclined to reconsider incorporation of the Establishment Clause, it is sufficient to dispel any invocation of reliance interests to support *stare decisis* on the ground that an incorporated Establishment Clause, properly understood as a prohibition of actual coercion, does not provide much more protection than the Free Exercise Clause. *See infra* Part II.A; *Newdow*, 542 U.S. at 46 (Thomas, J., concurring in the judgment) ("any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause"). As such, reliance on *Everson* is misplaced and should not prevent this Court for holding that the Establishment Clause is not incorporated against the States.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourth Circuit.

Respectfully submitted,

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